UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPELLATE MEDIATION PROGRAM

NOTE: In 1995, the Chief Staff Counsel's Office became part of the Office of the Clerk and is currently referred to as the Legal Division.

COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT APPELLATE MEDIATION PROGRAM

A number of federal Circuit Courts of Appeal and state appellate courts have implemented mediation projects within the last few years in response to increasing caseloads and delay. Mediation is often one component of a larger effort to manage the Court's work. In the D.C. Circuit, mediation is intended to supplement the Court's 1986 Case Management Plan, which was undertaken to accommodate a sixty percent increase in filings and pending cases over a two-year period. Mediation is also intended to help parties by curtailing the expense involved in protracted appeals and by providing a forum which stimulates the development of creative resolution options that would otherwise not be achievable by Court order or by the parties acting on their own.

The Appellate Mediation Program uses mediation to achieve settlement of cases. It also encourages the settlement of some issues in a case and the procedural streamlining of cases to simplify briefing and to reduce motions activity. Mediation efforts that are unsuccessful initially may result, weeks or even months later, in settlement.

Mediation differs considerably from arbitration and negotiation. In arbitration, an outcome is imposed upon the parties. In negotiation, discussion takes place between the parties, usual ly with no assistance from a neutral. In mediation, a neutral helps parties reach a resolution that is acceptable to them. Cases are settled only if the parties agree to a course of action that will terminate their case so that no further Court involvement is required.

The Appellate Mediation Program handles fewer than one hundred cases a year. Nonetheless, it has had a significant impact on the Court's workload. Cases that are settled do not proceed to oral argument, thus saving the time of judges and law clerks who would otherwise prepare for argument. Issues and positions are clarified in the mediation process so that, even if settlement is not achieved, the Court benefits from

more efficient briefing. Finally, mediation frequently saves time and money for the litigants themselves. It can also produce agreements that meet their needs more effectively than the relief that could be provided through the court proceeding. Mediation is offered at no cost to the parties.

CASE SELECTION

Cases filed with the Court of Appeals are screened by attorneys in the Chief Staff Counsel's Office for their appropriateness for mediation. Screening occurs approximately 45 days after a case has been docketed in the Court of Appeals.

No criminal cases enter the program. Civil cases are reviewed on an individual basis, with a number of factors considered in making the eligibility determination. These factors include the nature of the underlying dispute, the relationship of the issues on appeal to the underlying dispute, the availability of incentives to reach settlement or limit the issues on appeal, the susceptibility of these issues to mediation, the possibility of effectuating a resolution, the number of parties and the number of related pending cases.

Parties are encouraged to request mediation by completing a "Request to Enter Appellate Mediation Program" form and sending it to the Clerk *in duplicate*. Although such requests are not automatically granted, the Chief Staff Counsel gives them special consideration.

PROGRAM MEDIATORS

The Court has selected distinguished senior members of the bar to serve as mediators as well as attorneys who have had broad experience mediating complex civil cases. The mediators are experienced litigators who enjoy the Court's full confidence.

The mediators protect the confidentiality of all proceedings and do not communicate with the Court about what transpires during mediation sessions. Mediators are required to recuse themselves from handling any cases in which they perceive a

conflict of interest.

Mediators are not paid for their services, but are reimbursed by the Court for minor out-of-pocket expenses such as trips to the Courthouse. The Court also provides parking, administrative support and limited secretarial services if needed.

The primary role of program mediators is to make every effort to help parties reach a settlement or, at a minimum, to help parties resolve some issues in the case. If settlement is not possible, the mediators will help parties clarify or eliminate issues to expedite the litigation process.

CONFIDENTIALITY

Confidentiality is ensured throughout the mediation process. Attorneys in the Chief Staff Counsel's Office do not confer with judges in selecting cases for mediation. Mediators protect the confidentiality of all proceedings. Papers generated by the mediation process are not included in Court files, and information about what transpires in the mediation process is not at any time made known to the Court. The Circuit Executive's Office, which is responsible for program administration and evaluation and liaison between the mediators and Court personnel, maintains strict confidentiality about the content of the mediation in particular cases.

The above is not intended to guarantee absolute secrecy about the identity of the cases that are chosen for mediation. Nor is it meant to preclude dissemination of information about the types of cases going through the mediation process and about overall program results. Generic information about the program and cases entering it is available, and reports are generated for analysis and evaluation. Individual cases that have been resolved through mediation may be publicly identified or brought to the Court's attention as program successes if the litigants consent to such a disclosure.

MEDIATION PROCEDURES

The Chief Staff Counsel will identify cases for mediation approximately 45 days after they have been docketed in the Court of Appeals. Lead counsel and intervenors involved in cases selected for mediation will receive a letter from the Court describing the program and assigning a mediator. A copy of the Court's *en banc* Order defining the procedures to be followed will be included in the mailing. At the same time, the Court will send to the assigned mediator a copy of the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule II(a)(l) statements, and all relevant motions.

Within fifteen days of the selection of a case for mediation, counsel will submit a position paper not to exceed ten pages to the mediator. The position paper will outline the key facts and legal issues in the case and will include a statement of motions filed and their status. Position papers are not briefs, are not filed with the Court and need not be served on the other party unless the mediator so directs.

The mediator will schedule the initial mediation session within 45 days of the selection of the case for mediation. The mediator will set the date for the initial session, which will normally be held at the Court. However, a mediator may decide to hold a session in his/her office. The mediator will schedule additional mediation sessions, as needed. Whereas all cases in mediation are subject to normal scheduling for briefing and oral argument, it is possible that additional mediation sessions in a case will affect the scheduling process. If so, the attorneys shall file a motion to defer or postpone the briefing and/or oral argument date(s), representing that the mediator, whom they shall not identify by name, concurs in the request. Attorneys may not file any other motions that would notify the Court that the case is in mediation.

The Court requires that counsel for parties attend all mediation sessions. All parties are also strongly urged by the Court to attend each mediation session. Each party represented must have counsel or another person present with actual authority to enter into a settlement agreement during the session. In cases involving the United States government or the District of Columbia government, senior attorneys on either side

of the case may attend mediation sessions so long as someone with settlement authority can be reached during conference sessions. It is the responsibility of the United States Department of Justice attorneys in these sessions to furnish the mediator with the name and title of the government official authorized to effectuate settlement under 28 CFR, Part O, Subpart Y, whom the mediator and attorney can contact by phone during the mediation session. In cases involving the District of Columbia government, it is the responsibility of Corporation Counsel attorneys to furnish the mediator with the name and title of the government official authorized to effectuate settlement who can be contacted by phone during the mediation session. When settlement authority for the United States government rests with an official at the rank of Assistant Attorney General, its equivalent or higher, or with members of an independent agency, or when settlement authority for the District of Columbia government rests with officials above the rank of Corporation Counsel, the requirement that the official or members be reachable during the mediation session is waived unless the mediator for good reason specifically so provides in writing after reviewing the mediation papers.

If settlement is reached, the agreement, which shall be binding upon all parties, will be put into writing, and counsel will file a stipulation of dismissal. If the case is not settled, it will remain on the docket and proceed as though mediation had not been initiated. Regardless of the outcome of a case, mediators will complete a case evaluation form for each case mediated. Each attorney participating in the mediation will be asked to complete an evaluation form.

THE MEDIATION PROCESS

Mediation begins at a joint meeting attended by the mediator, counsel for the parties and, whenever possible, the parties themselves. The mediator explains how the mediation is to be conducted. After this introduction, each party is asked to explain to the other party or parties and to the mediator its views on the matter in dispute. The party who filed the appeal typically will speak first. The mediator is likely to refrain from asking questions or allowing the parties to ask questions of each

other until all parties have had an opportunity to speak.

Once the views of all parties have been stated in the joint session, the mediator probably will want to caucus individually with each of the parties. The purpose of these caucuses is to allow the mediator and the parties to explore more fully the needs and interests underlying their stated positions. It is also to help the parties begin thinking about settlement options that perhaps go beyond what could be accomplished in the court proceeding alone. The mediator will encourage the parties to think broadly about the problem and will help them to explore options for settlement.

Additional joint sessions may be held to explore settlement possibilities, or this work may be done just in the separate caucuses. The mediator, in consultation with the parties, will decide which approach is likely to be more beneficial under the circumstances of the particular case.

(Rev. Jan. 1995)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
ORDER ESTABLISHING APPELLATE MEDIATION PROGRAM

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Henderson and Randolph, Circuit Judges

ORDERED, by the Court, *en banc*, that civil appeals from the United States District Court, petitions for review of agency action, and original actions may be referred to a mediator designated by the Court to meet with counsel and parties to facilitate settlement of the case, to simplify issues or otherwise to assist in the expeditious handling of an appeal. Mediation will be initiated by order of the Court. It is

FURTHER ORDERED that mediation sessions must be attended by counsel for each party or another person with actual authority to settle the case. Additionally, the parties them selves are strongly encouraged to attend the sessions. In cases involving the U.S. government or the District of Columbia government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached during conference sessions except that in cases in which settlement authority for the United States government rests with officials of the rank of Assistant Attorney General (or its equivalent) or higher, or with the members of an independent agency or in cases in which settlement authority for the District of Columbia government rests with officials above the rank of Corporation Counsel, this provision shall not apply unless the mediator for good reason specifically so provides in writing after reviewing the mediation papers. Failure of counsel to attend sessions may result in the imposition of sanctions.

The Circuit Executive for the D.C. Circuit shall serve as the program administrator of the Appellate Mediation Program. A party may request mediation, but the Chief Staff Counsel will ultimately determine which cases are appropriate for mediation. Case selection will take place approximately 45 days after

a case has been docketed in the Court of Appeals. Lead counsel will receive notice of case selection and of the mediator assigned.

An initial mediation session will be scheduled by the mediator within 45 days of a case's selection for mediation. The mediator will schedule additional sessions, as needed. Mediation sessions will be held at the U.S. Courthouse for the District of Columbia, 3rd and Constitution Avenue, N.W., Washington, D.C. If mutually agreeable, however, the mediator may hold sessions in his/her office.

The Court will send the mediator a copy of the judgment or order on appeal, any opinion issued by the District Court or agency, the appellant's or petitioner's statement of issues on appeal, D.C. Cir. Rule 11(a)(1) statements, and all relevant motions. Within fifteen days of the case's selection for mediation, counsel shall prepare and submit to the mediator a position paper of no more than ten pages, stating their views on the key facts and legal issues in the case. The position paper will include a statement of motions filed and their status. All motions filed or decided while mediation is underway are to be identified for the mediator and submitted to him/her upon request. Copies of documents submitted to the mediator need not be served upon opposing counsel unless the mediator so directs. Documents prepared for mediation sessions are NOT to be filed with the Clerk's Office except as noted below.

All cases in mediation remain subject to normal scheduling for briefing and oral argument by the Clerk's office. If it is the mediator's view that additional mediation sessions are required and that such sessions would affect the briefing schedule in the case, the attorneys shall request an extension by filing a motion to defer or postpone the briefing and/or oral argument date(s). The attorneys shall represent that the mediator, whom they shall not identify by name, concurs in the request.

The content of mediation discussions and proceedings, including any statement made or document prepared by any party, attorney or other participant, is privileged and shall not

be disclosed to the Court or construed for any purpose as an admission against interest. To that end, the parties shall not file any motion or other document that would disclose any information about the content of a mediation, whether or not it has been concluded. This means that parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion other than a motion affecting the briefing or argument schedule.

No party shall be bound by anything said or done at a mediation session unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and shall be binding upon all parties to the agreement.

Mediators who have been selected by the Court to serve in the Appellate Mediation Program are highly experienced members of the bar who have been involved in the types of litigation that come before the Court. Mediators, who will serve without compensation, have received special training to help parties reach agreement and avoid the time, expense and uncertainty of further litigation. Mediation is offered to parties at no cost.

If a mediator makes any oral or written suggestion as to the advisability of a change in any party's position with respect to settlement, counsel for that party should promptly transmit the suggestion to his or her client if that client is not present at the mediation session. Counsel should explain to clients, whether present at mediation or not, the suggestions put forward by mediators and their import. It is

FURTHER ORDERED that if a case is settled, counsel shall file a stipulation of dismissal. Such stipulation must be filed within 30 days after the settlement is reached unless a short extension is requested by the attorneys by motion. If a case cannot be resolved through mediation, it will remain on the docket and proceed as if mediation had not been initiated; therefore, no notification to the Court is necessary.

A copy of this Order will be posted in the Office of the Clerk of the United States District Court for the District of Columbia and the Office of the Clerk of the United States Court

of Appeals for the District of Columbia Circuit. A copy of this Order also will be provided to all counsel in cases ordered into mediation.

EFFECTIVE: November 28,1988 *Per Curiam*
As amended April 19,1989, May 1, 1992, and March 20, 1993

ADDENDUM

In response to inquiry by the program's volunteer mediators, the Court has determined that the order establishing the appellate mediation program allows the mediators, in their discretion, to call or write clients or representatives of government agencies to request their attendance at mediation sessions. Any communication by the mediator with the persons or entities described above, however, must be fully disclosed to the counsel of record. The order also permits the mediator to communicate, in the presence of counsel, settlement offers or other appropriate information to clients or representatives of government agencies.

March 7, 1990